JD-60-09
Toledo, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BEBLEY ENTERPRISES, INC.

and Case No. 8-CA-38181

INTERNATIONAL UNION OF PAINTERS
AND ALLIED TRADES, AFL-CIO,
LOCAL UNION NO. 7 a/w INTERNATIONAL
UNION OF PAINTERS AND ALLIED TRADES

Thomas M. Randazzo, Esq., for the General Counsel.
Joseph J. Solomon, Esq., Toledo, Ohio, for the Respondent.
Thomas P. Timmers, Esq., (D'Angelo & Szollosi, LPA),
Toledo, Ohio, for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Toledo, Ohio, on September 21 and 22, 2009. The International Union of Painters and Allied Trades, AFL-CIO, Local Union No. 7 associated with The International Union of Painters and Allied Trades (the Union) filed the initial charge in this matter on February 17, 2009. It filed amended charges on April 20, and May 27, 2009. The General Counsel issued a complaint on May 29, 2009.

The General Counsel alleges that Respondent, Bebley Enterprises, Inc., an industrial cleaning contractor, violated Section 8(a)(5) and (1) by repudiating and/or terminating its collective bargaining agreement with the Union in December 2008, ceasing to make contributions to the Union's fringe benefit funds, ceasing to deduct and remit union dues and failing to furnish the Union with information it requested that is necessary for and relevant to the Union's duties as collective bargaining representative of Respondent's employees.

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act in December 2008, when its President, Thomas Bebley, told employees about his termination of Respondent's contract with the Union. The General Counsel alleges that Bebley's remarks implied a threat of loss of employment if the employees continued to support and remain members of the Union.

The General Counsel also alleges that Respondent violated Section 8(a)(3) and (1) by reducing the hours of work for employee Bobby Hill, changing his job classification from laborer to clerk, refusing to reinstate Hill to his laborer's position when he was released from light duty, issuing Hill written discipline and then discharging Hill on or about January 30, 2009.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Respondent and the Charging Party, I make the following

Findings of Fact

I. Jurisdiction

Respondent, Bebley Enterprises, Inc., is a corporation engaged in industrial cleaning, including the cleaning of sewers, sewer manholes and chemical tanks. Respondent's office is in Toledo, Ohio. Respondent performs services valued in excess of $50,000 for entities which are directly engaged in interstate commerce. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent's repudiation of its collective bargaining agreement

The parties' contractual relationship

Respondent has been in business since 1989. In October 2000, it signed a collective bargaining agreement with the Union for a term of three years which covered its laborers/industrial cleaners. The agreement was entered into pursuant to section 8(f) of the Act. Respondent also entered into a separate agreement with the Union covering the company's painters. Respondent has not repudiated the agreement covering the painters and that contract is not at issue in this matter.

The parties signed an extension of the Agreement covering the laborers/cleaners in February 2004, which expired on October 1, 2006. However, under the terms of the extension, this agreement continued year to year unless one party notified the other of a desire to change the agreement sixty days prior to October 1, 2006, or the anniversary date of the extension. Neither party so notified the other between 2006 and December 2008. Thus, the General Counsel and Charging Party contend that the parties were bound to this agreement until October 1, 2009. However, since, as discussed herein, the Agreement was not legally terminated in 2009, it is effective under Articles XXI and XXII, until at least October 1, 2010.

Article XXII of the extension provides that if either party fails to comply with the terms of the Agreement, it may be cancelled with 30 days notice. Respondent relies on this provision for its contention that it was privileged to terminate the collective bargaining agreement in December 2008.

Events leading to Respondent's repudiation of its relationship with the Union

James Peppers became the business representative of the Union in February 2006. In 2007, Peppers began to question whether Respondent was complying with Ohio's prevailing wage law on projects subject to that statute. The Union filed a complaint with the State of Ohio alleging failure to comply with the prevailing wage law. Then it withdrew its complaint and filed a lawsuit against Respondent in February 2008.

On November 26, 2008, Respondent's President, Thomas Bebley, came to Peppers' office with Eric Johnson, a consultant to Respondent. Bebley and Peppers discussed the Union's concerns as to whether Respondent was paying its employees properly for overtime work.

On December 9, 2008, the Union's counsel made a public records request, via email, to the City of Toledo for all certified payroll reports submitted by Bebley Enterprises pertaining to sewer work on the Consaul Street project in East Toledo since July 1, 2008.

City officials made inquires to Jason Tansey, an engineer with the Arcadis company, which acted as the city's representative on the Consaul project. Tansey responded to city officials on December 10, and sent a copy of his email to Gena White, Respondent's office manager, G.C. Exh. 8.

Repudiation/Refusal to comply with the Union's information request and alleged implied threat of loss of employment

On December 10, Thomas Bebley called Peppers and informed him that Respondent was terminating its Allied Trades (Laborer's/cleaners) collective bargaining agreement with the Union. Peppers asked Bebley for a list of Respondent's current employees. Bebley refused to provide this to the Union on the grounds that it already had this information.

Either on December 10, or soon afterwards, Bebley addressed a number of his employees. He told them, "that we were not going forward with our agreement, that they needed to contact their BA as to whether or not they want to stay with us or go forward with the Union," Tr. 131.[1]

In January 2009, Bebley reiterated in writing his decision to terminate this collective bargaining agreement, G.C. Exh. 10. Also, in January, Respondent unilaterally ceased making contributions to the Union's Health and Welfare Fund that were required pursuant to the Allied Trades Agreement. It also ceased deducting union dues and remitting such payments to the Union.

Respondent takes the position that it was entitled to repudiate the Allied Trades Agreement under Article XXII of the contract because the Union failed to comply with the agreement when it sought information from the City of Toledo and other contractors regarding its compliance with the Ohio prevailing wage law. Article XXII states that, "if either party fails to comply with the terms of this Agreement, this Agreement may be canceled with a 30 day written notice," G.C. Exh. 6, pg, 25.

Bebley contends that the Union failed to comply with the Collective Bargaining Agreement in seeking redress outside of the dispute grievance procedure set for in Article XIX and Article III, section 4. Article III, section 4 provides:

> It is further understood that the employee on each job, will not interfere in any way with the affiliations of the employees of the Employer's customers, or of the owner, or with the employees of other contractors, provided such contractors are not performing work within the jurisdiction of this Agreement.

[1] Employee accounts of Bebley's remarks do not differ materially from Bebley's testimony. Current employee Colen Williams testified that Bebley said that employees could stay with Respondent or stay with the Union; the Union didn't find employees their jobs; Bebley did so. Former employee Leon Barnett testified that Bebley stated that if employees stayed with the Union, they should be looking for Jamie Peppers to find them a job.

The Union submits that this provision has nothing to do with this case. It contends that the clause merely prohibits the Union and its members from trying to organize the employees of customers who retain Bebley to do industrial cleaning work.

Written Information Request: Respondent's refusal to comply

On January 29, 2009, the Union by counsel requested information about Respondent's employees in writing. This request included: the names of all current employees; the identity of all former employees who had worked for Bebley in the prior 24 months; current wage rates; current fringe benefits; any changes to the terms and conditions of employment of Bebley's employees since its repudiation of the collective bargaining agreement; the identity of all Respondent's contracts and contracts on which it anticipated bidding and the identity of all projects on which Respondent was then working. On February 4, 2009, Respondent, by counsel, declined to provide this information on the grounds that it no longer had a collective bargaining relationship with the Union.

Alleged discrimination against Bobby Hill

Bobby Hill was hired by Respondent as an industrial cleaner in 2004. In 2005 or 2006, he left Respondent's employment for a period of 8 or 9 months. When he returned, Hill often drove a truck which was used to vacuum debris out of sewers and manholes. Hill was often, or at least sometimes, a crewleader on cleaning projects.

In September 2008, Hill complained to Respondent's President, Thomas Bebley, about the fact that employee Charlie Taylor was making several dollars more per hour than was Hill. Tr. 146.[2] Hill told Bebley that he was taking his complaint to Union Business Representative James Peppers. In his meeting with Thomas Bebley on November 26, 2008, Peppers specifically mentioned Bobby Hill's concerns that he was not being paid everything that Respondent owed him, Tr. 82. Hill threatened to take his disputes with Respondent to the Union on a least several occasions, Tr. 524.

Alleged discriminatory reduction in hours

The General Counsel alleges in paragraph 8(a) of the Complaint that on or about December 15, 2008, Respondent discriminatorily reduced Hill's hours of work. Hill worked 133.50 hours in October 2008; 213.5 hours in November and 131 hours in December.

Comparable figures for other laborers are as follows: Leon Barnett worked 160.65 hours in October; 196 in November and 210 in December. Charlie Taylor worked 160.15 hours in October, 224.75 in December and 191 in December. Colen Williams worked 128.25 hours in October, 226.25 in November and 180.75 in December, Exh. R-B-1.

In early December 2008, Respondent hired Lamar Hogue to drive a second vacuum truck. Hill at this time regularly drove a vacuum truck. In the pay period ending December 13,

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[2] Much of Bebley's testimony is qualified by statements that he "may have" said certain things, e.g. Tr. 145. However at Tr. 146, Bebley confirmed that Hill complained to him about his pay relative to Charlie Taylor's and at Tr. 147, he confirms that in a meeting with Peppers in late November 2008, Peppers mentioned that Hill had brought his complaints to the Union. Therefore, I credit Hill's testimony that he told Bebley in September that he was going to the Union with his complaint about his wages.

Hogue worked 22 hours; Hill worked 35.75. In the pay period ending December 20, Hogue worked 54.50 hours and Hill worked 46.50. In the pay period ending December 27, Hogue worked 36.25 hours and Hill worked only 10.75. Hill's hours in December 2008 may have reduced in part due to the inability of a subcontractor to work in inclement weather.

Comparisons of Hill's hours with those of other employees for the month of January 2009 are difficult in as much as Hill was physically unable to perform his laborer's duties from January 21-29, 2009.

Alleged discriminatory reclassification of Bobby Hill to a clerical position, alleged discriminatory discipline and termination

Hill's disciplinary record

Respondent concedes that Bobby Hill was generally cooperative with its customers. However, in the last year of his employment, prior to his termination on February 2, 2009, Respondent issued Bobby Hill a number of disciplinary notices/reprimands, which are mentioned in his termination letter. They are as follows:

February 25, 2008, Hill was given an oral warning for not properly cleaning his respirator. Hill refused to sign the written documentation regarding this warning and testified that he was written up because he was the crew leader and another crew member failed to clean his respirator.

June 4, 2008, Hill was given a verbal warning for failure to wear personal protective equipment. He admits that he did not wear his protective coveralls while inside his truck and appears to concede that he was required to do so.

September 13, 2008: Respondent gave Hill an oral warning for failing to notify it that he was unavailable for weekend emergencies. Hill refused to sign the document. He contends that he advised Respondent a week prior to the incident that he would be attending a wedding.

September 19, 2008: Respondent presented Hill with a notice admonishing him for failing to turn in employee timesheets on a Friday. Hill didn't sign this notice either. He contends that he turned in his crew's timesheets the following morning because on Friday he would have had to slide them under the door of Respondent's office and was afraid they might be blown away.

November 15, 2008: Bebley apparently suspended Hill for one day for failing to report to work and failing to notify Respondent that he was not coming in. Hill submits he did report to work in the morning, was sent home and was unable to come to back at Respondent's request because he was at the hospital with his mother. Hill signed Respondent's disciplinary form on this occasion.

December 2, 2008: Respondent gave Hill a written reprimand for failing to prepare for a job. Hill refused to sign the document. He contends it was not his fault that other employees failed to properly load his truck. Bebley also apparently reprimanded Hill the same day for again failing to wear his protective coveralls inside his truck.[3]

[3] This reprimand is mentioned in Respondent's February 2, 2009 termination letter to Hill. No documentation for this incident is in the record, although Hill concedes it occurred.

December 16, 2008: Respondent presented Hill with a written reprimand for improperly pouring water out of his truck in violation of Respondent's safety and environmental policies. The record does not indicate the nature of Hill's alleged conduct or whether or not he agreed with the reprimand.

January 30, 2009: Respondent issued Hill a written warning for insubordination. It alleges that he refused to return all his company uniforms to the company for an inventory count.

The motor vehicle accident of January 20, 2009

On January 20, 2009, Hill was involved in a motor vehicle accident while driving Respondent's vacuum truck after working at a Johns Manville plant. Before the accident occurred Hill notified Thomas Bebley that the truck's steering was not working properly. Bebley claims he told Hill not to move the truck. Hill claims that Bebley told him to take it to the company that serviced Respondent's equipment.

While turning a corner near the service facility, Hill collided with another vehicle, injuring the other driver sufficiently for the driver to be transported to the hospital by ambulance. This was the second vehicle accident Hill had been involved in while driving a truck for Bebley. The police cited Hill for the January 20, accident. Respondent presented Hill a reprimand for being at fault in this accident. It appears Respondent considered using the accident as a basis for terminating Hill but did not do so on the advice of its consultant Bobbie Mancillas.

Written warning for failure to notify Respondent of medical treatment; reclassification

Within a day or two of the accident, Hill sought treatment at the Toledo Hospital. Afterwards, he sought treatment at Occupational Care Consultants (OCC), which was the health care provider to which Respondent's employees were required to go after job-related injuries. OCC diagnosed a left shoulder strain and put Hill on light duty until January 26, 2009. Respondent issued Hill a written warning for failure to notify it before seeking medical treatment. Hill refused to sign this warning.

On Friday, January 23, 2009, Hill reported to work. He testified that he was sent home that day and returned to Respondent's office on Monday, January 26. On Tuesday, January 27, Bebley informed Hill that his job was being reclassified from laborer to clerk. Hill was on light duty until January 29, when all the physician's restrictions on his work activities were removed. Respondent was aware that Hill's restrictions were removed as of January 29.

Respondent's termination of Bobby Hill

On January 27, Respondent told Hill to bring all his uniforms into the office. Hill testified that Gena White told him that since he was being reclassified as a clerk, he didn't need the uniforms. He testified further that when he objected, White told him he had to turn the uniforms in for "a count."

Respondent contends that all laborers were asked to turn in their uniforms and that Hill was terminated, at least in part, due to his insubordinate refusal to comply with this directive. As discussed in more detail, later, I find that the General Counsel made a prima facie case that Respondent discriminatorily disciplined and terminated Bobby Hill and that Respondent has not met its burden that it would have fired him in the absence of his protected activity.

First of all, I discredit Respondent's testimony that the directive to Hill was a nondiscriminatory directive to all field employees.[4] To the contrary, I find that at least initially only Hill was ordered to bring his uniforms into the office because Respondent did not intend to let him work in the field again. General Counsel Exhibit 37, a January 23, 2009 email from Gena White to labor consultant Bobbie Mancillas, establishes that as of that date Thomas Bebley was looking for an excuse to fire Hill and that the reclassification and directive regarding the uniforms was part of this plan to find a pretextual reason to discharge Hill.

I rely in part of the following testimony in concluding that Respondent did not tell Hill to bring in his uniforms as part of a nondiscriminatory effort to count the uniforms of all employees. There is no evidence, other than Respondent's self-serving testimony, that the uniform directive was given to all employees at or about the same time it was given to Hill. I conclude to the contrary that it was part of the plan to create a pretextual reason to discharge him.

At Tr. 198 the General Counsel asked Bebley, "Now, as part of the – of the reclassification, you instructed Mr. Hill to bring in his uniforms; is that correct?" Bebley answered, "No, that had nothing at all to do with anything with reclassification. It had to do—it's strictly a business decision that affected everyone. It was part of the uniform policy."

At Tr. 208-09, the General Counsel asked Bebley, "…Isn't it true that you told Bobby to bring those uniforms in because he was—he no longer needed them because he was a clerk?" Bebley responded, "I don't recall that, but I may have said that, or that he wouldn't be in the field. I think I probably would have said something like that."

The testimony of Gena White, Respondent's office manager, is also conflicting as to the reasons for which Hill was told to bring in his uniforms. The General Counsel asked White if she told Respondent's labor relations consultant, Bobbie Mancillas, that Hill was being required to return his uniforms because he didn't need them as a clerk. She responded:

> No. She had me reclassify him as a clerk for the week that he was in there [the office]. And I said, well he won't be using his uniforms this week, so I'll have him bring them in.
>
> That was based on what she told me…
>
> And everybody was bringing them in as well…
>
> Q. …Is it not true that you informed Ms. Mancillas on January 26 that you were changing his classification to office clerical, is that true?
>
> A. Yes, that's what I told her.

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[4] Gena White testified that all employees received notices with their check that they were required to bring their uniforms into the office. There is no documentary evidence of this in the record.

Another reason that I decline to credit White and Bebley on this issue is the inconsistency of the reasons they gave for counting employees' uniforms. Bebley testified this was done because Respondent was deciding whether or not to retain its current uniform contractor, Tr. 232. White testified the inventory was made because Respondent was losing a lot of uniforms, Tr. 518-19.

> Q. Okay. And that you asked for the return of the uniforms because they were not needed any more?
>
> A. Right. That's correct.

Tr. 548.

White also testified that when Hill asked her if other employees were being required to bring in their uniforms, her response was, "I'm talking to you. We're not dealing with everyone else. I want yours," Tr. 519. This response is inconsistent with a general directive. An employer acting in a nondiscriminatory manner would have likely demonstrated to Hill that the directive was not discriminatory, for example, by showing him the notice that was included in other employees paychecks.

On January 29 or 30, White gave Hill a reprimand for failing to turn in his uniforms. On January 30, Bebley asked Hill where his uniforms were located. Hill responded that some were at home and some were in the back of his truck.

Hill went to the shop in the rear of the facility. Soon thereafter, Bebley entered the shop with two police officers. The police asked Hill why he was trespassing. Hill responded that he worked there. Then Bebley said, "no you don't, you're fired," Tr. 215-20.[5]

Later on January 30, Hill returned to Respondent's facility with 8 uniform pants and 6 shirts belonging to Respondent. Bebley contends that Hill was given until February 2, to bring in the rest of his uniforms. Further, he contends that he fired Hill for a culmination of misdeeds, the final of which was Hill's insubordination in failing to bring in the rest of his uniforms.

On February 2, 2009, Respondent sent Hill a letter stating that he was being terminated due to "accessive (sic) prohibitive violations from February 25, 2008 up to and including Jan. 30 2009." The letter listed the disciplinary incidents mentioned earlier in this decision. Only two of these, the alleged December 16 incident regarding pouring water out of his truck and the January 30 alleged insubordination occurred after Respondent repudiated its contract with the Union.

The termination letter also stated:

> In addition to these violations you have had two (2) at fault accidents with company vehicles, equipment has been misplaced and your attitude has become extremely confrontational.
>
> Finally, you were instructed to bring in your uniforms for count-that directive also has not been met as of 2:45 PM on Feb. 2, 2009, which is the final reason for this termination.

I credit Hill's testimony that he was fired in the shop area and discredit Respondent's testimony that he was given an additional opportunity to turn in the rest of his uniforms.[6]

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[5] Bebley's testimony at this point is very contradictory. I find that Bebley told Hill he was fired in the shop area on January 30. Bebley's testimony at Tr. 216 appears to corroborate Hill's testimony that he told Hill that he was fired in the shop; a few pages later Bebley recanted this testimony.

[6] On February 2, 2009, Respondent also sent Hill a letter charging him $358 for missing

Continued

Indeed, Thomas Bebley testified that he may have decided to fire Hill on January 30, Tr. 222, a concession totally inconsistent with Respondent's contention that it discharged Hill for failure to return the balance of his uniforms by February 2.

Respondent's reasons for many of the actions it took regarding Hill are generally inconsistent. In a submission to the Ohio Office of Unemployment Compensation, Respondent stated that the final event leading to Hill's termination was insubordination, i.e. failure to follow a management directive on January 29, 2009 to bring in his uniforms for an inventory count. Respondent then stated that Hill was uncooperative and belligerent concerning this directive on January 30, and then never returned to Respondent's facility after January 30.

In further communication with the unemployment office on March 11, 2009, Respondent stated that Hill was asked to bring his uniforms in on January 27, and that Hill refused to comply. Respondent then stated that Hill returned with the police and 8 pants and 6 shirts. Further, Respondent stated that Hill was given until February 2 to return the remainder of the uniforms or he would he charged for them. The company also stated that Hill refused to sign a disciplinary form and never contacted Bebley Enterprises after January 30. Thus, Respondent concluded this fax communication with the assertion that Hill's employment ended because he was a "no call; no show-voluntary quit," G.C. Exh. 34.

Analysis

Alleged discrimination against Bobby Hill

In order to establish a violation of Section 8(a)(3) and (1), the Board generally requires the General Counsel to make an initial showing sufficient to support an inference that the alleged discriminatee's protected conduct was a 'motivating factor' in the employer's decision. Then the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct, *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 889 (lst Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399-403 (1983) ; *American Gardens Management Co.*, 338 NLRB 644 (2002). Unlawful motivation and anti-union animus are often established by indirect or circumstantial evidence.

The Board has held that when, as here, an employer offers inconsistent or shifting reasons for its actions, a reasonable inference may be drawn that the reasons being offered are pretexts designed to mask an unlawful motive. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 506 (2007), citing *Mt. Clemens General Hospital*, 344 NLRB 450, 458 (2005); *Holsum De Puerto Rico, Inc.*, 344 NLRB 694, 714 (2005); and *GATX Logistics, Inc.*, 323 NLRB 328, 335 (1997). Shifting and inconsistent justifications for an adverse personnel action often provide a basis for concluding that such actions were discriminatory, *Pacific Design Center*, 339 NLRB 415 (2003).

In this matter, I conclude that the General Counsel has made a sufficient initial showing to shift the burden to Respondent to prove that it would have discharged Bobby Hill in the absence of his union activity, or that his hours would have been reduced in December 2008, or that he would have been reclassified from laborer to clerk. I conclude further that Respondent had not met its burden.

uniform pants, shirts and jackets.

Reduction in hours

Respondent knew that Hill was complaining to the Union about his pay in the fall of 2008. Respondent also harbored a great deal of animus towards the Union as the result of its inquiries on December 9, 2008 regarding prevailing wage compensation and towards those of its employees it suspected of complaining to the Union. Almost simultaneously with Respondent becoming aware of the Union's inquiries, Lamar Hogue began driving a vacuum truck for Respondent, G.C. Exh. 11, page 14, G.C. Exh. 18, page 23; G.C. 19, page 9, Tr. 158-60.[7] As a result, Bobby Hill's hours declined as compared with his hours in November and as compared with other employees.

It may well be that Respondent had a nondiscriminatory reason for hiring Hogue and assigning him work that could have been performed by Hill. However, since the General Counsel made a *prima facie* case of discrimination, it is Respondent's burden to prove that it would have hired Hogue to perform this work in the absence of its anti-Union animus. It has failed to do so. I would note that if Respondent needed to hire Hogue to drive a vacuum truck in December, there should be evidence that it hired another vacuum truck driver to replace Hill in January, or evidence as to why it was unnecessary to do so.

Reclassification of Hill to a clerical position and failure to restore Hill to his laborer's position

Gena White's January 23, 2009 fax to Bobbie Mancillas is a veritable smoking gun as to the motivation for Respondent's classification of Hill from laborer to clerk. The fax makes it quite clear that the Respondent reclassified Hill in order to create a pretext to fire him. There is no evidence that Hill was qualified to be a clerk or that this assignment was made with a view towards making him a safer driver or training him to perform clerical duties.

Respondent was also aware that Hill's physical restrictions were of limited duration. The record establishes that Respondent did not contemplate returning Hill to his duties as a laborer when his restrictions expired. To the contrary, it intended to keep him in a job he was not qualified to perform. In fact, it did so after it was informed that he was no longer under any physical restrictions from a physician.

Written Warning and Discharge

I find that the nondiscriminatory explanation Respondent has advanced for giving Hill a written warning on January 30, 2009 and then discharging him is pretextual. For one thing, Respondent was unable to give a consistent account of its conduct.

At Tr. 177-78, the General Counsel asked Thomas Bebley at what point in time did he determine that he wanted to fire Bobby Hill. Bebley responded that it was, "…I think in February when, you know, the insubordination took place, that's where these issues became, you know, sort of grave." Bebley then confirmed that he was talking about Hill's alleged failure to bring his uniforms in for an inventory count.

[7] Thomas Bebley testified that he hired Hogue in October. The documentary evidence in this record indicates that Hogue was hired in December, almost immediately upon Bebley's verbal repudiation of his relationship with the Union. I discredit his testimony that Hogue was hired prior to December 10, 2008.

At Tr. 223-34, Bebley testified that Hill was fired for a number of misdeeds, including becoming an increased safety risk. However, he stated that if Hill had returned his uniforms as requested, he might not have been fired.

The February 2, 2009 termination letter that Respondent sent to Hill told him that he was being fired for all the disciplinary items that had occurred since February 2008, two at fault accidents with company vehicles, misplaced equipment, and his confrontational attitude. The letter concluded that Hill's failure to bring his uniforms in for a count by February 2 was the final reason for Hill's termination.

Respondent's office manager, Gena White informed the Ohio Unemployment office that Hill was terminated as no call/no show—voluntary quit for failing to return the balance of his uniforms, G.C. Exh. 34. At Tr. 544, White also testified that Hill was terminated for not showing up and not calling in on February 2.

However, a January 23 email from White to Labor Consultant Bobbie Mancillas establishes that Thomas Bebley was looking for a reason to fire Hill even before Hill was asked to bring in his company uniforms, G.C. Exh. 37 Thus, the record as a whole establishes that Respondent's assertion that it fired Hill for insubordination with regard to the uniforms and/or that he was terminated for failing to show up for work or calling in on February 2, is a pretext.

Finally, Respondent's discriminatory motive is established by its disparate treatment of Hill compared to other employees. I do not credit Respondent's assertion that other employees were required to bring in all their uniforms at the same time that Hill was ordered to do so. However, even assuming that were the case, there is no evidence that anyone other than Hill was terminated or given a written warning for failure to account for all the uniforms issued to them. Other employees, at the worst, may have been charged for missing uniforms.

Termination of the Collective Bargaining Agreement

Respondent admittedly terminated its collective bargaining agreement with the Union before its expiration. It argues, without citing any authority that it was entitled to do so because of the Union's inquiries to customers regarding its payment of the prevailing wage. This is not a valid reason for terminating an otherwise valid agreement. First of all, among employees' Section 7 rights is the right to file concerted complaint about wages, *B & M Excavating, Inc.,* 155 NLRB 1152 (1965) enfd. 368 F.2d 624 (9th Cir. 1966). Thus, Respondent could not terminate an employee for filing such a Complaint if it were concerted. Since the Union was acting on behalf of unit employees in making inquiries regarding Respondent's payment of prevailing wages, it is equally illegal for an employer to terminate a collective bargaining agreement for this reason.

It is well established that Section 7 protects employee efforts, "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978), *Five Star Transportation, Inc.,* 349 NLRB 42 (2007). A Union and/or its members may communicate with third parties to advance such legitimate interests when the communication is not so disloyal, reckless or maliciously untrue to lose the Act's protection, *Arlington Electric,* 332 NLRB 845 (2000). Certainly, the Union herein was well within in rights in inquiring as to Respondent's compliance with the Ohio prevailing wage statute. Moreover, there is no evidence that its communications were reckless or maliciously untrue.

Moreover, I reject Respondent's tortured interpretation of the collective bargaining agreement. However, it is unnecessary to interpret the contractual provisions on which Respondent relies, because it clearly did not provide 30 days written notice of its cancellation of the agreement as required by Article XXII. Respondent informed the Union of its repudiation of the agreement in writing on January 20, 2009, G.C. Exh. 10, after it verbally repudiated and ceased compliance with its terms.[8] Thus, even as a contractual matter, Respondent illegally terminated its contract with the Union.

As Respondent failed to present any legitimate reason for terminating its collective bargaining relationship with the Union, I conclude that it violated Section 8(a)(5) and (1) in doing so and unilaterally changing the terms and conditions of employees of its employees. Thus, for example, Respondent's failure to continue its contributions to the Union's fringe benefit funds and to deduct and remit union dues violates Section 8(a)(5).

Failure to provide information requested by the Union

Upon request, an employer has the legal duty to furnish its employees' bargaining agent with information relevant and necessary to the performance of its statutory duties. *NLRB v. Acme Industrial. Co*., 385 U.S. 432. (1967). The law deems information about the wages, hours, and other terms and conditions of employment of unit employees to be presumptively relevant. *Timken Roller Bearing Co*., 138 NLRB 15 (1962).

An employer's statutory obligation to furnish the union relevant information, on request, absent special circumstances, is not relieved merely because the union may have access to the requested information from other sources, *Postal Service,* 276 NLRB 1282, 1288 (1985); *New York Times, Co.,* 265 NLRB 353 (1982); *Kroger Co.,* 226 NLRB 512 (1976).

It necessarily follows from my conclusion that Respondent illegally repudiated its collective bargaining relationship with the Union, that it violated Section 8(a)(5) and (1) in failing to comply with the Union's information requests. Moreover, its factual defenses, i.e., that the Union already had the information and the information was available from other sources are completely specious with regard to much of the information requested.

There is no evidence, for example, that in December 2008 and January 2009 that the Union had, or could obtain the information it requested that pertained to Lamar Hogue, who Respondent hired in the fall of 2008 or any information as to the jobs Respondent was working at, or planned to bid in January 2009.

Respondent, by Thomas Bebley, violated Section 8(a)(1) by telling employees on December 10, 2009, that they should contact their business agent as to whether or not they wanted to remain employees of Respondent or "go forward with the Union."

It is well settled that an employer violates Section 8(a)(1) by making statements that would reasonably tend to interfere with, restrain or coerce employees in the exercise of their section 7 rights, regardless of whether employees are in fact intimidated by the remarks, *Helena Laboratories Corporation,* 228 NLRB, 294, 295 (1977); *Palagonia Bakery Co., Inc,* 339 NLRB 515 (2003). A finding of restraint or coercion depends on the objective standard as to whether such conduct reasonably tends to interfere with the free exercise of employee rights. I conclude

[8] Although the written notification is dated January 9, 2009, it was not mailed until January 20, Tr. 115, 369.

that Bebley in suggesting that continued union membership was inconsistent with continued employment by Respondent restrained and coerced its employees in the exercise of their Section 7 rights.

Summary of Conclusions of Law

Respondent Bebley Enterprises, Inc., violated Section 8(a)(5) and (1) by repudiating and/or terminating its collective bargaining agreement with the Union in December 2008, unilaterally ceasing to make contributions to the Union's fringe benefit funds, unilaterally ceasing the deduction and remittance of Union dues and failing to furnish the Union with information it requested that is necessary for and relevant to the Union's duties as collective bargaining representative of Respondent's employees.

Respondent violated Section 8(a)(1) of the Act in December 2008, when its President, Thomas Bebley, in speaking to employees, implied a threat of loss of employment if they continued to support and remain members of the Union.

Respondent violated Section 8(a)(3) and (1) by reducing the hours of work for employee Bobby Hill, changing his job classification from laborer to clerk, refusing to reinstate Hill to his laborer's position when he was released from light duty, issuing Hill written discipline on January 30, 2009, and then discharging him.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged Bobby Hill, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent must also remit to the Union all dues it was required to withhold and transmit pursuant to the collective bargaining agreement, with interest, *see Forest Hills Family Foods,* 353 NLRB No. 37 (September 30, 2008) slip opinion at page 3; *Merryweather Optical Company,* 240 NLRB 1213, 1216 (1979).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Bebley Enterprises, Toledo, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging or otherwise discriminating against any employee for supporting Local Union No. 7 a/w International Union of Painters and Allied Trades or any other union.

(b) Failing to recognize and to comply with terms of its collective bargaining agreement with Local Union No. 7 a/w International Union of Painters and Allied Trades, including making current and past due payments to the Union's fringe benefit funds, and collecting and remitting to the Union dues that is past due and due in the future.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Bobby Hill full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Bobby Hill whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to Bobby Hill's unlawful discharge, unlawful January 30, 2009 written discipline and unlawful reclassification from laborer to clerk, and within 3 days thereafter notify Bobby Hill in writing that this has been done and that these adverse personnel actions will not be used against him in any way.

(d) Recognize and on request, bargain with Local Union No. 7 a/w International Union of Painters and Allied Trades as the exclusive representative of its laborer/industrial cleaner employees.

(e) At the request of Local Union No. 7 a/w International Union of Painters and Allied Trades, rescind any departures from the terms and conditions of employment that existed at the time of Respondent's repudiation of its collective bargaining agreement with the Union. Nothing in this order shall authorize or require the withdrawal or elimination of any wage increase, or other improved benefits or terms and conditions of employment.

(f) Make all bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of any unilateral changes in the terms and conditions of their employment and Respondent's repudiation of the collective bargaining agreement.

(g) Reimburse bargaining unit employees for expenses resulting from Respondent's unlawful failure to comply with the terms of the collective bargaining agreement.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Remit to Local Union No. 7 a/w International Union of Painters and Allied Trades with interest, any dues it was required to withhold and transmit under the collective bargaining agreement.

(j) Within 14 days after service by the Region, post at its Toledo, Ohio headquarters copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 10, 2008.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 11, 2009.

_____
Arthur J. Amchan
Administrative Law Judge

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

JD-60-09
Toledo, OH

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against any of you for supporting Local Union No. 7 a/w International Union of Painters and Allied Trades or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Local Union No. 7 a/w International Union of Painters and Allied Trades and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the laborers/industrial cleaners bargaining unit.

WE WILL, within 14 days from the date of this Order, offer Bobby Hill full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Bobby Hill whole for any loss of earnings and other benefits resulting from his discharge and other discrimination, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge and other discrimination against Bobby Hill and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge and other discriminatory actions will not be used against him in any way.

WE WILL at the request of Local Union No. 7 a/w International Union of Painters and Allied Trades, rescind any departures from the terms and conditions of employment that existed at the time of our repudiation of our collective bargaining agreement with the Union. However, WE WILL NOT unilaterally withdraw or eliminate of any wage increase, or other improved benefits or terms and conditions of employment.

WE WILL make all bargaining unit employees whole for any loss of earnings and other benefits suffered as a result of any unilateral changes in the terms and conditions of their employment and our repudiation of the collective bargaining agreement.

WE WILL reimburse bargaining unit employees for expenses resulting from our unlawful failure to comply with the terms of the collective bargaining agreement.

JD-60-09
Toledo, OH

WE WILL remit to Local Union No. 7 a/w International Union of Painters and Allied Trades with interest, any dues we were required to withhold and transmit under the collective bargaining agreement.

BEBLEY ENTERPRISES, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1240 East 9th Street, Federal Building, Room 1695

Cleveland, Ohio 44199-2086

Hours: 8:15 a.m. to 4:45 p.m.

216-522-3716.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 216-522-3723.